IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MACON COUNTY INVESTMENTS, INC. and REACH ONE, TEACH ONE OF AMERICA, INC.,	)	
Plaintiffs,	)	
	)	**Civil Action No.: 3:06-cv-224-WKW**
v.	)	
SHERIFF DAVID WARREN, in his official capacity as the SHERIFF OF MACON COUNTY, ALABAMA,	)	
Defendant.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

COME NOW the Plaintiffs Macon County Investments, Inc. ("MCI") and Reach One, Teach One of America, Inc. ("Reach One, Teach One"), hereinafter collectively referred to as "the Plaintiffs", and hereby file their Response in Opposition to the Defendant's Motion to Dismiss. The Plaintiffs state the following:

STANDARD OF REVIEW

The threshold that must be met to survive a Motion to Dismiss is "exceedingly low". *Ancata v. Prison Health Services, Inc.,* 769 F.2d 700, 703 (11th Cir.1985). When considering the Defendant's Motion to Dismiss, this Court must give deference to the Plaintiffs' assertion of the facts and accept those facts and "all reasonable inferences" as being true. *Stephens v. Dep't of Mental Health and Human Serv.*, 901 F.2d 1571, 1573 (11th Cir. 1990); *see also Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A.,* 711 F.2d 989, 994-95 (11th Cir. 1983) (stating that in ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the plaintiff). Further, the Court should only dismiss a complaint " if no relief could be granted under any set of facts that could be proved consistent with the allegations". *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984).

In addition to requesting a dismissal of the Plaintiffs' equal protection claims under Rule 12(b) (6), the Defendant Sheriff David Warren ("hereinafter referred to as "the Defendant Sheriff") also asserts that the Plaintiffs lack standing to pursue this action. The Plaintiffs have the same burden of proof to survive these standing contentions as it does the Defendant's arguments against their equal protection claims. "[E]ach element of standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e. ***with the manner and degree of evidence required at the successive stages of the litigation***." *Florida Public Interest Research Group v. EPA*, 386 F.3d 1070, 1083 (11th Cir. 2004) (emphasis added; internal citations omitted). As such, the Plaintiffs' threshold for surviving the Defendant's standing claims are also "exceedingly low". *See Ancata*, 769 F.2d at 703.

FACTUAL ALLEGATIONS

When reviewing MCI and Reach One, Teach One's Complaint, the following allegations must be accepted as true. The State of Alabama allows for the Amendments to its Constitution which only effect a certain County. Through this type of Amendment, or local legislation, the Alabama Legislature authorized the operation of bingo facilities in Alabama. Amendment 744 was ratified by the Legislature, and it governs the operation of bingo gaming in Macon County. The Amendment provides, in pertinent part, that "the operation of bingo games for prizes or money by nonprofit organizations for charitable, educational, or other lawful purposes shall be legal in Macon

County." *See* Ala. Const. (1901) Amend. 744. Further, the Amendment provides that the non-profit organization may enter into an agreement with an individual, firm, or a corporation to operate the facility.

> "A nonprofit organization may enter into a contract with any individual, firm, association, or corporation to have the individual or entity operate bingo games or concessions on behalf of the nonprofit organization. A nonprofit organization may pay consulting fees to any individual or entity for any services performed in relation to the operation or conduct of a bingo game."

Ala. Const. (1901) Amend. 744 (4). The Legislature placed no limit on the number of licenses that can be issued or facilities that can be authorized to operate gaming in Macon County.

Amendment 744 also states that the Sheriff of the County shall be responsible for promulgating the rules regarding the licensing and operation of the bingo facilities. Pursuant to Amendment 744, the Defendant Sheriff promulgated "Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County" in December of 2003. At that time, the Rules stated that ***any non-profit organization*** could make an application for a Class B Bingo license and that the location of the facility, including the land, building and improvements, had to be at least ***$5 million in value***. The Defendant Sheriff has issued only one Class B Bingo facility license under these Rules. That facility is currently operating in Macon County.

Six (6) months later, on June 2, 2004, the Defendant Sheriff promulgated the "First Amended and Restated Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County, Alabama." The First Amended Rules provide that before a Class B Bingo License can be granted a minimum of fifteen (15) non-profit organizations must submit an application and that the facility and location had to be at least $15 million in value. The Sheriff has issued no additional Class B Bingo licenses under the First Amended Rules.

On January 1, 2005, again six (6) months after the amending of the First Amended Rules, the Defendant Sheriff issued a "Second Amended and Restated Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County, Alabama." The Second Amended Rules stated that at no time shall there be more than sixty (60) Class B Licenses in Macon County, Alabama. Upon information and belief, there are currently fifty-nine (59) Class B licenses issued in Macon County, Alabama only to the original and sole facility. However, there have been no additional Class B Bingo licenses issued under the Second Amended Rules. The only reasonable inference for the change in the rules was to eliminate the ability of new applicants to meet them.

On or about July 25, 2005, Reach One, Teach One applied for a Class B Bingo license in Macon County. In accordance with Amendment 744, Reach One, Teach One contracted with MCI to operate the facility. To date, there has been no grant or denial by the Defendant Sheriff of the Plaintiffs' application. Further, contrary to the Defendant's assertion that the Plaintiffs' application was incomplete, there has been no notification from the Sheriff to the Plaintiffs that the application is somehow lacking.

From the facts alleged by the Plaintiffs, one can reasonably infer that the Sheriff has made intentional efforts to treat the Plaintiffs differently from others – specifically the only Class B Bingo licensed facility owners and licensees that are currently in operation in Macon County. The Sheriff's actions have violated the Plaintiffs' rights under the equal protection clause of the Fourteenth Amendment of the United States Constitution. Furthermore, the Sheriff's actions have caused the Plaintiffs injury which is actual and appropriate to be remedied by this Court.

ARGUMENT

I. THE PLAINTIFFS' EQUAL PROTECTION CLAIM IS SUFFICIENTLY PLED

The growing trend in equal protection claims is the "class of one" claim. The class of one claim as articulated in *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074, 145 L. Ed. 2d 1060 (2000) provides that a successful equal protection claim is one where "the plaintiff alleges that she has been intentionally treated from others similarly situated and that there is no rational basis for the difference in treatment." The plaintiff in *Olech* requested that the defendant Village connect their property to its water supply. The Village required the Plaintiff to grant it a 33-foot easement to fulfill her request. Previously, the Village only required property owners to grant a 15-foot easement. The plaintiff filed suit against the Village alleging that the additional requirement was violative of the Equal Protection Clause of the Fourteenth Amendment. The plaintiff claimed that the requirement was not rational, was arbitrary and was the result of ill will. *Olech*, 120 S. Ct. at 1074. The Court held that the plaintiff's assertions that the Village's requirement was irrational and arbitrary was "sufficient to state a claim for relief under traditional equal protection analysis" *Olech*, 120 S. Ct. at 565. Using this framework, the Plaintiffs' equal protection claim in the instant case can easily survive a Motion to Dismiss.

A. THE PLAINTIFFS HAVE ALLEGED THAT THEY ARE BEING TREATED DIFFERENTLY THAN OTHERS

As the Plaintiffs state in their Complaint, the Defendant Sheriff's actions only serve to treat MCI and Reach One, Teach One differently than the current and Class B Bingo licensed facility operating in Macon County. (Complaint ¶ 22). These allegations are more than mere conclusory statements. They are specific in the nature and content of the Defendant Sheriff's actions.

MCI and Reach One, Teach One have alleged that previous applicants seeking a Class B Bingo license in Macon County were only required to have one (1) non-profit organization and that the location of the facility, including the land, building and improvements, had to be at least $5 million in value. In fact, the sole Class B Bingo licensed facility in Macon was granted a license to operate under these requirements. However, now that the Plaintiffs are seeking to secure a Class B Bingo license in Macon County, the Defendant Sheriff has a requirement that fifteen (15) non-profit organizations must submit an application and that the location of the facility, including the land, building and improvements, be at least $15 million in value. These allegations serve as the basis of the Plaintiffs assertion that they are being treated differently from others.

Upon development of the record through discovery, the Plaintiffs will show that there are similarly situated individuals/entities that received different treated, namely the current and Class B Bingo licensed facility in Macon County. This fact is already patent in the Complaint and underscored in the Sheriff's Motion to Dismiss by referencing that the Plaintiffs have not built a multi-million dollar facility before applying for the license. This is an absurd rule apparently designed to restrict the gaming market to a sole licensed Class B Bingo facility in Macon County. At the this stage, the Plaintiffs need only allege the differential treatment. The Plaintiffs' allegations are sufficient to state a cause of action for the violation of the Equal Protection Clause. As such, the Defendant's Motion to Dismiss should be denied.

B. THE PLAINTIFFS HAVE ALLEGED THAT THE DEFENDANT'S PROMULGATED RULES ARE IRRATIONAL AND ARBITRARY

The plaintiff in *Olech* merely asserted that the defendant's requirements were irrational and arbitrary, and thus, resulted in a violation of the Equal Protection Clause. MCI and Reach One, Teach

One have made similar allegations. The Plaintiffs allege that there is no rational basis for the increase in the number of required non-profit organizations to obtain a license; there is no rational basis for limiting the number of non-profit organizations which can receive a license in Macon County to sixty (60); nor is there any rational basis for the Defendant Sheriff's delay in consideration of the Plaintiffs' application or the failure to issue a license. When the liberal standards of pleading are applied, these allegations are sufficient to survive a Motion to Dismiss. *See APT Tampa/Orlando v. Orange County and the Bd. of Commissioners*, 1997 WL 33320573 [No. 97-891-CIV-ORL-22] (Dec. 10, 1997 M.D. Fla.).

The rules, as currently amended, are not only irrational, but compliance is impossible to achieve. The number of Class B Bingo licenses which can be issued in Macon County is limited to sixty (60) non-profit organizations. Upon information and belief, more than forty-five (45) licenses have already been issued for the operation of the sole bingo gaming facility in Macon County. Therefore, it would be impossible for an applicant to submit fifteen (15) non-profit organizations as potential licensees. The Defendant Sheriff also states that MCI and Reach One, Teach One have not actually built a location valuing $15 million. However, it is highly inconceivable and unfair to expect an applicant would completely build a facility worth $15 million prior to the issuance of a license to operate a gaming facility. These rules and the actions taken under the rules promulgated by the Defendant Sheriff are irrational and are arbitrary. The rules serve no purpose other than to discriminate against and exclude the Plaintiffs from operating a Class B Bingo facility in Macon County.

II. THE DEFENDANT'S ASSERTIONS FOR A RATIONAL BASIS ARE VAGUE AND UNFOUNDED

The Defendant Sheriff asserts that there is a rational basis for the various rule changes. Specifically, that the amendments were based upon the need to regulate bingo gaming. (Defendant's Motion to Dismiss, p.21). Although the Defendant's argument is one more likened to one for summary judgment after discovery has been had, the Plaintiffs can still negate the Defendant's contentions.

The Defendant Sheriff claims that in the "Commentary to Amended and Restated Bingo Regulations" he explained that the 2004 Amendments were done to "maintain, protect and enhance the integrity of, the viability and the economic benefit derived from, bingo games for the eligible nonprofit organizations in Macon County that offer material charitable and educational purposes in Macon County, Alabama." (Defendant's Motion to Dismiss, p. 4). This reason is vague at best, self-serving at worst. The Sheriff's position should be subjected to discovery and proof. The explanation employs positive and colorful wording, but none establish a clear, concrete reason to justify the changes made to the 2003 Regulations.

The Defendant Sheriff also states that the decision to increase the number of charities required to obtain a license from one (1) to fifteen (15) to allow "a large representative group of charities...the opportunity to obtain the benefits associated with a Class B Bingo License." This assertion is unfounded as the Original Rules did not prevent a group of charities from applying for a license. Under the Original Rules, one charity could file an application or one hundred charities could collectively apply for a license. Thus, the amendment to the rules is not rationally related to the stated purpose. Further, the irrationality of the amendment is demonstrated by the fact that no additional

Class B Bingo licenses were issued under these Amended Rules.

In his Commentary to the 2005 Amendments, the Defendant Sheriff asserts that the amendments were made pursuant to Amendment No. 744 to the Constitution of Alabama and the Alabama Attorney General's investigation of gaming activities in the State. (Defendant's Motion to Dismiss, p. 6). However, nothing in Amendment No. 744 (Exh. 1) or the Attorney General's published findings (Exh. 2) suggest any need for the limit on the number of Class B Bingo facilities in Macon County. In fact, the Attorney General's findings that at the time of his investigation, Class B Bingo facilities were operating legally and within the State's definition of bingo gaming. There is no mention or suggestion from the Attorney General that the Sheriff of Macon County needed to alter or limit the number of Class B licensees in the County. As such, the Defendant Sheriff's reliance upon the Attorney General's findings as support to amend the Original Rules is unfounded and a ruse warranting continuation of this case.

Further, Amendment 744 did not undergo any changes from 2003 to 2005. In essence, the same legislation governed Class B bingo gaming in Macon County at the time the Original Rules were promulgated and at the time that the Defendant offered his 2005 Amendments. Again, nothing in Amendment 744 would support the Defendant's contention that limiting bingo gaming in the County was somehow necessary or required.

Although the majority opinion in *Olech* did not discuss the plaintiff's alternative theory of ill-will to prove a constitutional violation, it did not expressly negate the Seventh Circuit Court of Appeals' "holding that a plaintiff can allege an equal protection violation by asserting that state action was motivated solely by a 'spiteful effort to get him for reasons wholly unrelated to any legitimate state objective." 120 S. Ct. at 564-65. Given the examples plead of the unnecessary and restrictive changes in the rules, coupled with the Sheriff's failure to act upon the application, there is a reasonable basis for the Court to presume that Plaintiffs will be able to demonstrate the requisite ill-will present in this case. This ill-will squarely negates any possibility that the amendments were created upon a rational basis. Accordingly, the Defendant's Motion to Dismiss should be denied.

III. THE DEFENDANT'S ARGUMENTS THAT THE PLAINTIFFS' CLAIMS ARE NOT RIPE AND ARE MOOT ARE INCONSISTENT AND MISPLACED

The Defendant asserts that this Court lacks jurisdiction over the Plaintiffs claims because 1) the claims are not ripe, and 2) the claims are moot. The doctrine of ripeness proposes that a claim should be dismissed because it is premature. *Pittman v. Cole*, 267 F.3d 1269, 1278 (11th Cir. 2001) (quoting *Digital Prop., Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997). Whereas the doctrine of mootness proposes that a claim should be dismissed because it is no longer active. *Adler v. Duvall County Sch. Bd.*, 121 F.3d 1475, 1477. A claim cannot be both "unripe" and moot or rather premature and overly mature. For the Defendant to make such an argument against the Plaintiffs' equal protection claims is inconsistent.

A. THE PLAINTIFFS' CLAIMS ARE RIPE FOR ADJUDICATION

1. The absence of a final decision from the Defendant Sheriff does not dismiss this claim for lack of ripeness

The Defendant Sheriff claims that MCI and Reach One, Teach One's claims are not ripe because the Sheriff has not issued a final decision regarding their application. The application was filed in June 2005 – almost one year ago, yet the Defendant, by no fault of the Plaintiffs, has failed to issue a response. His delay cannot then be used as justification to his argument that the Plaintiffs' claims are not ripe.

In *Florida Cannabis Action Network v. City of Jacksonville*, 130 F. Supp. 2d 1358, 1367 (M.D. Fla. 2001), the Court evaluated a First Amendment claim brought by a plaintiff who applied for a "festival permit".[1] The application did not become complete under administrative definitions of the granting authority until the Sheriff and the Public Health Officer gave their approval to the application. The granting authority is then given twenty days to approve the "completed application" after the approval of the Sheriff and the Public Health Officer is obtained. The Sheriff and the Public Health Officer never gave their approval, and the local ordinance did not require them to give an approval within a certain time limit thereby preventing the application from review of the final granting authority. The Court held that the failure to issue a final decision and the lack of a time frame to issue a final decision violated First Amendment protections. *Florida Cannabis*, 130 F. Supp. 2d at 1367-68.

Likewise, the Sheriff's failure here to act upon the Plaintiffs' application for over a year with no stated time to act upon the application should not bar the Plaintiffs from pursuing their Equal Protection claim. Further, the Sheriff's extended period of silence regarding the application can be reasonably taken as a denial because the Plaintiffs cannot effectively and legally operate a Class B bingo facility without first being granted a license. These acts or rather the failure to act by the Defendant Sheriff constitutes an ongoing violation of the Plaintiffs' Fourteenth Amendment protections.

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[1]Although the Plaintiffs note that the framework for a First Amendment claim and a Fourteenth Amendment Equal Protection Claim are different; however, the analysis regarding the effect of delay on the judicial review appears reasonably similar.

2. The Plaintiffs claims are fit for adjudication and denial of judicial review would result in hardship

In determining whether a claim is ripe, Courts have applied the fitness and hardship test. *Ohio Forestry Ass'n Inc. v. Sierra Club*, 523 U.S. 726, 733, 118 S. Ct. 1665, 1670, 140 L. Ed. 2d 921 (1998), *see also Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1, 13-14, 120 S. Ct. 1084, 1093, 146 L. Ed. 2d (2000). The fitness and hardship test involves the following factors: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented. *Ohio Forestry*, 118 S. Ct. at 1670. The Plaintiffs' claims are ripe as they meet the prongs of the fitness and hardship test.

Delayed review of the Plaintiffs' equal protection claim would only cause greater loss to the Plaintiffs. As stated in the Plaintiffs' Complaint and Application for Preliminary Injunction, the Plaintiffs have already purchased land for the facility, began construction for the facility and has negotiated financing for the machines. (Complaint at ¶ 17). The longer that this issue remains unresolved, business reputation, goodwill and income will diminish, and the future of the public service goals of the Plaintiffs' MCI/Reach One, Teach One venture are threatened.

Judicial intervention will not interfere with any further administrative action. Currently, there are no further administrative actions being undertaken by the Defendant Sheriff in regards to the Plaintiffs' application. Further, the Defendant Sheriff has shown by his unreasonable delay that he has no intention of taking any action regarding the Plaintiffs' application. As such, the only actions that Plaintiffs may now seek are judicial in nature as opposed to administrative.

The Court would benefit from the further development of issues presented in this case. The Plaintiffs' claims involve serious allegations of the denial of equal protection pursuant to the Fourteenth Amendment of the United States Constitution. The Plaintiffs have sufficiently pled this claim; however, discovery would better bring the merits of the Plaintiffs' claims to light. Specifically, the history of bingo gaming of Macon County and the relationship between the Defendant Sheriff and the owner(s) of the sole Class B licensed facility in the County will show that this case goes beyond whether a license will or will not be granted. Instead, this case involves a planned effort to exclude other Class B bingo facilities not for any health, economic or safety issues, but for singular motivations.

B. THE PLAINTIFFS' CLAIMS ARE NOT MOOT

A claim is only moot when the issues have been resolved, and there is no active case or controversy. *Adler*, 121 F.3d at 1477. Such is not the situation in the instant case. The Plaintiffs' application is still outstanding. The Defendant Sheriff's Amended Rules are still in effect. These rules as stated earlier have an effect of treating applicants differently. Specifically, the Plaintiffs have been treated differently from the operator(s) of the current and only licensed Class B bingo facility in Macon County. This differential treatment is not rationally based upon a legitimate concern. Instead, the rationale is couched in vague and unfounded terms to hide the animus behind the subsequent changes of the Original Rules.

The Defendant Sheriff argues that because the Plaintiffs have alleged that the Defendant gave verbal assurances that their application would be granted, the Plaintiffs' claims are moot. However, the Plaintiffs cannot operate a Class B bingo facility with verbal assurances. Further, these assurances have not changed the discriminatory rules that are in place. Until the Original Rules are reinstated and the Plaintiffs are treated in the same manner as the other license holder(s), the Plaintiffs' claims are still live and active.

WHEREFORE, PREMISES CONSIDERED the Plaintiffs respectfully request that this Court deny the Defendant's Motion to Dismiss.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record via this Court's electronic filing system on this the 9th day of May, 2006.

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